Filed 5/13/19 P. v. Garcia CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANDREW GARCIA, Defendant and Appellant.	B284517 (Los Angeles County Super. Ct. No. BA427590)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Remanded with directions.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Andrew Garcia of the first degree felony murder of University of Southern California (USC) graduate student Xinran Ji and found true the special allegation that Garcia had committed the homicide in the course of an attempted robbery. On appeal Garcia contends the court erred in refusing his request to instruct the jury on second degree malice murder and in admitting hearsay evidence. He also argues the prosecutor committed prejudicial misconduct and the court erroneously imposed fines and fees without considering his ability to pay. We affirm Garcia's convictions and remand for the trial court to give Garcia the opportunity to request a hearing and to present evidence demonstrating his inability to pay the applicable fines, fees and assessments.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

An amended information filed May 15, 2015 charged Garcia and three other individuals, Alberto Ochoa, Alejandra Guerrero and Jonathan Del Carmen, with the murder of Ji with malice aforethought. (Pen. Code, § 187, subd. (a).)[1] It specially alleged Garcia and his codefendants had personally used a dangerous or deadly weapon, a baseball bat, in committing the offense (§ 12022, subd. (b)(1)) and the killing had occurred while Garcia and his confederates were engaged in an attempted robbery (§ 190.2, subd. (a)(17)). Garcia was tried separately from his

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[1] Statutory references are to this code unless otherwise stated.

codefendants. He pleaded not guilty and denied the special allegations.[2]

2. *Evidence at Trial*

On July 24, 2014 Ji and a few of his USC classmates met for a study group. When the study session finished, just after midnight, Ji volunteered to walk one of his study partners to her apartment on West 30th Street near the USC campus. After making sure she arrived safely, he left to walk the few blocks to his own apartment. Ochoa, Guerrero and Garcia suddenly jumped out of a car, attacked Ji and attempted to take his backpack. Ji escaped his attackers and ran. Garcia grabbed an aluminum baseball bat from Ochoa and chased after Ji. When Garcia caught up to Ji, he repeatedly beat him on the face and head with the bat. Garcia stopped only when he saw his confederates were about to drive away. None of Ji's belongings was taken. The attack was captured on two security cameras, and video footage was shown to the jury.

Ji, staggering and bloodied, managed to get up after the attack and make his way back to his apartment. His roommate found his lifeless body later that morning. The coroner testified Ji had suffered multiple skull fractures and died from blunt force trauma.

Following his arrest, Ochoa asked to call his mother. The police officers stepped out of the interrogation room while Ochoa used the telephone. A video camera installed in the ceiling captured part of this conversation. Ochoa told his mother in

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[2] Garcia was also charged with, and convicted of, offenses unrelated to Ji: second degree robbery, attempted second degree robbery and assault with a deadly weapon.

Spanish that he and Garcia had attempted to rob Ji. Ochoa said he had hit Ji once with a baseball bat on the neck, not too hard. Garcia, however, had beaten Ji with the bat, striking him several times as if he had wanted to kill him.

Ochoa took the stand at Garcia's trial and invoked his Fifth Amendment right not to incriminate himself. The recording of Ochoa's part of his conversation with his mother was admitted into evidence over Garcia's Sixth Amendment and hearsay objections. The court found Ochoa's statements to his mother were nontestimonial and satisfied the declaration-against-penal-interest exception to the hearsay rule.

During his recorded custodial interview following his arrest, Garcia admitted he and his confederates had decided to go "flocking," a street-term, Garcia explained, that meant to "rob someone." They tried to rob Ji, but he would not let go of his backpack. Garcia claimed he had hit Ji several times with his fists during the attempted robbery, but insisted he did not hit Ji with the bat. Garcia stated he had held the bat, which contained his blood and DNA, and even tried to hit Ji with it, but he had missed. He then handed the bat to Ochoa, who, Garcia claimed, had used it to beat Ji.

Garcia did not testify at trial.

3. *Theories of the Case*

The People tried the homicide case solely on a theory of felony murder. They argued Garcia had killed Ji while engaging in an attempted robbery. As for the special allegations, the People argued Garcia had inflicted the fatal blows with the baseball bat. Alternatively, the People argued, even if the jury found that Ochoa had inflicted the fatal blows, it should find Garcia guilty of murder and the special circumstance allegation

true because Garcia was a major participant in the attempted robbery and had acted with reckless indifference to human life.

The defense argued that Garcia, while present at the time of the attack, lacked specific intent to rob Ji and was essentially just a bystander to his friends' crimes. Garcia's counsel insisted his client, 18 years old at the time of the offense, had confessed to committing the attempted robbery only to save his younger friends from prosecution.

4. *Jury Instructions, Verdict and Sentence*

The court instructed the jury on, among other things, first degree felony murder (CALJIC Nos. 8.21, 8.27), attempted robbery (CALJIC No. 9.40), personal use of a deadly or dangerous weapon (CALJIC No. 17.16) and special circumstance murder in the course of an attempted robbery (CALJIC Nos. 8.80.1, 8.81.17). The trial court refused Garcia's request to instruct the jury with malice murder because the People had elected to proceed solely on a felony-murder theory. The court alternatively found no substantial evidence of a malice murder to support the instruction.

The jury found Garcia guilty on all counts and found the special allegations true. The court sentenced Garcia to an aggregate state prison term of life without the possibility of parole (LWOP) for first degree felony murder with special circumstances plus five years eight months.[3] As to each count,

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[3] In addition to LWOP, the court imposed one year for the use of a deadly or dangerous weapon (§ 12022, subd. (a)) on the murder count (count 1), plus consecutive determinate terms for the counts against other victims unrelated to the attack on Ji: three years for a separate robbery (count 2), plus eight months (one-third the middle term) for attempted robbery (count 3) and

the court imposed a $40 court operations assessment (§ 1465.8, subd. (a)) and a $30 court facilities assessment (Gov. Code, § 70373). The court also imposed a $300 restitution fine (§ 1202.4, subd. (b)) as to the murder count.[4]

DISCUSSION

1. *The Court Did Not Prejudicially Err by Refusing To Instruct the Jury on Malice Murder*

"Under California law, trial courts must instruct the jury on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed the lesser included offense and not the greater offense." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196 (*Gonzalez*); accord, *People v. Shockley* (2013) 58 Cal.4th 400, 403.) The rule prevents "'"either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other."'" (*Gonzalez*, at pp. 196-197; accord, *People v. Smith* (2013) 57 Cal.4th 232, 239-240.)

The Supreme Court has "established two tests for whether a crime is a lesser included offense of a greater offense: the elements test and the accusatory pleading test." (*Gonzalez, supra,* 5 Cal.5th at p. 197.) Satisfaction of either test triggers the duty to instruct. (*Ibid.*) "Under the accusatory pleading test, a

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one year (one-third the middle term) for assault with a deadly or dangerous weapon (count 4).

[4] The court also found Garcia jointly and severally liable along with his codefendants for restitution in the amounts of $5,000, to be paid to the Victim Compensation Board, and $7,485, to be paid directly to Ji's family. Garcia's defense counsel told the court he would not object to those orders; and Garcia does not challenge them on appeal.

crime is another's 'lesser included' offense if all of the elements of the lesser offense are also found in the *facts alleged* to support the greater offense in the accusatory pleading." (*Ibid.*) Thus, when, as here, the information charges the defendant with malice murder, the prosecutor's election to proceed on a theory of felony murder alone does not relieve the court of its duty to instruct the jury on the charged malice murder and lesser included offenses of that charge when those offenses are supported by substantial evidence. (*Ibid.* ["In this case, defendants were accused of committing murder with malice aforethought. This accusation triggered the duty to instruct on lesser included offenses of that charge if there was substantial evidence that defendants committed the lesser, but not the greater, offense," even though prosecutor's sole theory at trial was felony murder].)

Garcia contends there was substantial evidence to support malice-murder instructions and insists the failure to give them was prejudicial because the jury could have found him guilty of the less serious crime of second degree murder. The identical issue was presented in *Gonzalez*, *supra,* 5 Cal.5th 186, decided after Garcia filed his opening appellate brief. In *Gonzalez* an information charged the defendant with malice murder. At trial the prosecutor proceeded solely on a theory of first degree felony murder—the murder occurred while the defendant was engaged in a robbery—and the trial court instructed the jury with first degree felony murder as the only theory of murder. No instructions on malice murder or its lesser included offenses were given. On appeal from his felony-murder conviction, the defendant argued the trial court had a sua sponte duty to instruct the jury on malice murder and its lesser included offenses. (*Id.* at p. 196.) The failure to do so, the defendant

argued, left the jury with an all-or-nothing choice between first degree murder or acquittal despite evidence supporting second degree murder or manslaughter. (*Ibid.*)

The *Gonzalez* Court began its analysis by assuming, without deciding, that substantial evidence supported instructions on the charged offense of malice murder and lesser included offenses of voluntary and involuntary manslaughter. (*Gonzalez*, *supra*, 5 Cal.5th at p. 198.) Although the prosecution tried the case solely on a felony-murder theory, under the accusatory pleading test the trial court had a sua sponte duty to instruct on malice murder and its lesser included offenses. (*Id.* at p. 196.) Nonetheless, the Court found any error harmless. The Court observed that the risk to a defendant in failing to give instructions on lesser included offenses of malice murder is that a jury faced with an all-or-nothing choice will ignore the court's instructions and convict the defendant of a felony murder despite the prosecution's failure to carry its burden. (*Id.* at p. 200.) However, the *Gonzalez* jury found true the special circumstance allegation that the defendant had killed the victim during the commission of a robbery and thus necessarily found the defendant had committed first degree felony murder rather than a lesser form of homicide. (*Ibid.* ["[A] true special circumstance finding requires a jury to find that the killing occurred during the commission of a felony. Accordingly, such a finding necessarily demonstrates the jury's determination that the defendant committed felony murder rather than a lesser form of homicide"]; see *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the

omitted instructions adversely to defendant under properly given instructions"].)

In his reply brief, Garcia concedes *Gonzalez* is identical to the case at bar and his argument, explicitly rejected in *Gonzalez,* necessarily fails. He is right. Even if there were substantial evidence to support malice murder instructions in this case, the jury's special circumstance finding ensured any error in that regard was harmless.

2. *The Court Did Not Prejudicially Err in Admitting Ochoa's Hearsay Statement to His Mother*

a. *Ochoa's statements*

During his telephone conversation with his mother, Ochoa stated in Spanish, "Andrew [Garcia] hit this Chinese guy on his face with a baseball bat . . . . ." "I was trying to hit the Chinese guy first . . . with the baseball bat, and I didn't hit him right; I hit him like behind his neck . . . with a baseball bat. And then Andrew took the baseball bat and he started fucking him up really bad like trying to almost kill 'em." "I hit him one time, but I didn't—I didn't pick up the bat the way Andrew did. Andrew picked up the bat and nearly killed him. . . . Andrew did everything . . . . Why are they trying to put that on me?" The recorded statement, along with a certified English translation, was introduced in its entirety at trial over Garcia's objections.

b. *Governing law and standard of review*

Evidence Code section 1230 provides, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or propriety interest, or so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would

not have made the statement unless he believed it to be true."

"'The proponent of such [hearsay] evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.] The against-interest exception to the hearsay rule is 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant' [citations], and 'a declaration against penal interest must be "distinctly" against the declarant's penal interest' [citations]. Whether or not a statement is against penal interest can be determined only by considering 'the statement in context.'" (*People v. Grimes* (2016) 1 Cal.5th 698, 741 (*Grimes*); accord, *People v. Duarte* (2000) 24 Cal.4th 603, 610-612.)

A trial court's decision whether a statement is admissible under Evidence Code section 1230 is reviewed for abuse of discretion. (*Grimes, supra,* 1 Cal.5th at pp. 711-712; *People v. Lawley* (2002) 27 Cal.4th 102, 153.)

c. *Garcia has not demonstrated reversible error*

Garcia observes Ochoa's statements were partly inculpatory—"I wanted to rob Ji; I hit him once with the bat"—and partly an effort to shift the bulk of the blame to Garcia—Garcia repeatedly struck Ji with the bat as if he wanted "to kill him." Under those circumstances, Garcia argues, Ochoa's hearsay statements to his mother were not "specifically disserving" to his penal interest. (See *People v. Duarte, supra,* 24 Cal.4th at pp. 611, 612 ["'the precedents in the hearsay area provide a persuasive reminder that declarations against penal interest may contain self-serving and unreliable information' and, consequently, 'an approach which would find a declarant's

statement wholly credible *solely because* it incorporates an admission of criminal culpability is inadequate'"; "[i]n order to "'protect defendants from statements of unreasonable men if there is to be no opportunity for cross-examination,'" we have declared [Evidence Code] section 1230's exception to the hearsay rule 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant'"].)

As the Supreme Court explained in *Grimes, supra,* 1 Cal.5th at page 715, a mixed statement by an accomplice containing both inculpatory and exculpatory portions must be examined in context: "'As a matter of common sense,'" a statement that takes the form of """I did it, but X is guiltier than I am,""" is less reliable than a statement """I did it alone, not with X." That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.'" (Accord, *In re Sakaris* (2005) 35 Cal.4th 140, 155 [portions of declarant's confession that tended to inculpate an accomplice "'could well have been held inadmissible as attempts to deflect culpability away from the declarant'"].) Nonetheless, the Court has "permitted the admission of those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.'" (*Grimes,* at p. 715; accord, *People v. Gallardo* (2017) 18 Cal.App.5th 51, 71.) Ultimately, the Court explained, context matters; and the question is, under the totality of the circumstances, whether the statement tends to underscore the

declarant's responsibility for the crime rather than diminish it. (*Grimes,* at p. 716.)

Although Ochoa's statement plainly implicates Ochoa as a major participant in the robbery, Garcia contends Ochoa would not have been aware of the intricacies of the felony-murder rule and would have only understood his statements in the context of shifting the blame for Ji's death from himself to Garcia. Viewed in this way, Garcia argues, Ochoa's statements were not specifically disserving and, therefore, not particularly reliable. The People, on the other hand, insist Ochoa's statements to his mother identifying himself as a major participant in the attempted robbery have extra credibility; they were made to a trusted parent outside the presence of his interrogators. (See *People v. Arceo* (2011) 195 Cal.App.4th 556, 577 [conversations "'between friends in noncoercive setting that fosters uninhibited disclosures'" are most reliable].)[5]

We need not decide whether the court abused its discretion in resolving this contextually dependent question in favor of admissibility. The security video footage showed Garcia beating Ji with the bat, and Garcia and Ochoa admitted to police during their custodial interrogations they intended to commit a robbery. Garcia stopped beating Ji only when he saw his friends start to drive away without him, demonstrating a reckless indifference to life that supported the jury's special circumstance finding. Thus, even if Ochoa's statements had been excluded, it is not reasonably probable Garcia would have received a more favorable verdict. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 887

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[5] There is no evidence in the record as to whether Ochoa knew or suspected his conversation was being recorded.

[erroneous admission of hearsay evidence is reviewed under state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Seumanu* (2015) 61 Cal.4h 1293, 1308 [same].)

3. *Garcia's Prosecutorial Misconduct Arguments Are Forfeited; He Has Not Established Ineffective Assistance of Counsel*

a. *Governing law and standard of review*

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."'" (*People v. Seumanu, supra,* 61 Cal.4th at pp. 1331-1332; accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.) Bad faith on the prosecutor's part is not required. (*People v. Hill* (1998) 17 Cal.4th 800, 821.) In this regard, "'[t]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667 (*Centeno*); see *People v. Sandoval* (2015) 62 Cal.4th 394, 438.)

A prosecutor enjoys wide latitude in commenting on the evidence, including identifying reasonable inferences derived from the evidence. (See *People v. Edwards* (2013) 57 Cal.4th 658, 736 ["[a] prosecutor's 'argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom'"]; *People v. Hill*, *supra*, 17 Cal.4th at p. 823 [same].) Comments that go beyond the evidence to appeal solely to the passions or prejudices of the

jury are not permitted. (See *People v. Tully* (2012) 54 Cal.4th 952, 1021 [prosecutors may use epithets when warranted by the evidence, "'as long as these arguments are not inflammatory and principally aimed at arousing the passion and prejudice of the jury'"]; *People v. Redd* (2010) 48 Cal.4th 691, 742 ["'[i]t is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response"'"].)

Ordinarily, "'"[t]o preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument."'" (*People v. Charles* (2015) 61 Cal.4th 308, 327; accord, *People v. Williams* (2013) 58 Cal.4th 197, 274.) The forfeiture doctrine does not apply only when a request for an admonition would have been futile or would not have cured the harm. (*People v. Seumanu*, *supra*, 61 Cal.4th at pp. 1328-1329; *People v. Hill, supra,* 17 Cal.4th at p. 820.)

When the issue has been preserved, we review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) A defendant's conviction will not be reversed for prosecutorial misconduct that violates state law "'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.)

b. *The prosecutor's statements*

Garcia identifies several statements made by the prosecutor that he contends were improper. During his opening statement the prosecutor identified Ji as an only child born to Chinese parents under that country's one-child policy. Continuing, the prosecutor said Ji was "an avid photographer," "loved all things that moved" like "planes, trains and automobiles," had worked "diligently throughout his entire young life competing rigorously in China to distinguish himself as an 'academic scholar'" and "won a prestigious academic scholarship [to USC]." Garcia's relevance objection was sustained, and the court instructed the prosecutor to "move on."

Garcia acknowledges these statements, standing alone, do not constitute misconduct, let alone reversible error. (See *People v. Millwee* (1998) 18 Cal.4th 96, 137 [nothing prevents the prosecutor from making an opening statement in "a story-like manner that holds the attention of lay jurors and ties the facts and governing law together"].) But, he contends, they began what became a pattern of improper prosecutorial appeals to the passions and sympathies of the jury. For example, during closing argument the prosecutor stated, "When I think about him in the time that he died, . . . I feel really bad for him because he front-loaded his life with hard work, with discipline, with study, preparing himself for something that he never had a chance to take advantage of . . . . And one has to take pause and consider someone who spent as much time as he must have preparing himself for a future that he never got the chance to get to . . . ." "He was excited. He was happy to be here. He was happy to go to those four-hour study groups and work on his projects." Defense counsel's objection on speculation grounds was

overruled. The prosecutor continued, "And whether that is absolutely true or not, I would rather think of it that way."

The prosecutor described the attack on Ji as "terrifying," asked the jury to consider the "psychological terror" Ji must have endured during the assault and how, as Ji picked himself up from the ground to try and make his way to his apartment, "it had to be a very lonely and scary place for him." After summarizing the evidence of the brutality of the repeated blows to Ji's head and the damage inflicted to his brain, the prosecutor stated, "It is striking that somebody with such a beautiful mind would die in this way. The thing that made him really extraordinary is the thing that Mr. Garcia targeted and killed." The prosecutor finished by reminding the jury that Ji's classmates will go on with their lives and have careers and families, but that "will never happen for Xinran Ji. His life . . . stopped. And that extraordinary young man has been reduced to that" (a photograph of Ji).

c. *Most of Garcia's prosecutorial misconduct arguments have been forfeited*

Other than the prosecutor's opening statement describing Ji as an only child and a scholar with a beautiful mind and his closing argument that Ji enjoyed his study group, Garcia did not object to any of the prosecutor's statements he now identifies as making up a pattern that, considered together, constitutes misconduct. Accordingly, he has forfeited that argument. (*People v. Charles, supra,* 61 Cal.4th at p. 327; *People v. Williams, supra,* 58 Cal.4th at p. 274.)

d. *Garcia has not demonstrated his trial counsel was constitutionally ineffective*

"'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.'" (*Centeno, supra,* 60 Cal.4th at p. 674; accord, *People v. Lopez* (2008) 42 Cal.4th 960, 966.) To prevail on his claim of ineffective assistance of counsel, Garcia must demonstrate his counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms and, because of those deficiencies, there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; accord, *Centeno,* at pp. 674, 676.)

"'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'" When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was '"'no conceivable tactical purpose'" for counsel's act or omission.' '[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . . ,' and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.'" (*Centeno*, *supra*, 60 Cal.4th at pp. 674-675 (citations omitted); accord, *People v. Jackson* (2016) 1 Cal.5th 269, 349.)

Garcia contends the prosecutor improperly appealed to the sympathies of the jurors when he invited them to consider the

terror Ji felt during the attack and the future he would never get to experience; and defense counsel was ineffective in not objecting to those remarks. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 ["'[w]e have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of a trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt'"]; *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [the prosecutor's invitation to the jury in guilt phase of capital trial to reflect on all that the victim had lost through her death was an improper appeal for sympathy for the victim].)

Many of the prosecutor's remarks, including his description of the brutality of the killing, were fair comment on the evidence. To the extent the prosecutor moved beyond appropriate commentary to invite the jury to consider the terror Ji felt during the beating and all that was lost as a result of his death, although plainly improper, those remarks were fleeting. It is entirely possible counsel elected not to object to expedite argument and avoid continued emphasis on the brutality of Ji's death. At the very least, on this record, which is silent on counsel's reasons for not objecting, we cannot say there was no conceivable tactical reason for counsel's failure to object to the remarks Garcia now challenges on appeal.

Moreover, even if counsel's failure to object fell below objective standards, Garcia has not carried his burden to demonstrate prejudice. The evidence that Garcia brutally beat Ji during an attempted robbery was overwhelming, supported by surveillance footage of the attack, Garcia's own statements concerning the robbery, and substantial physical evidence. The court instructed the jury to consider the evidence and reasonable

inferences therefrom and specifically reminded them that arguments by counsel were not evidence. The court also admonished jurors not to be influenced by "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," but to base their decision on the facts and the law. We presume the jury followed the court's instructions. (*Centeno, supra,* 60 Cal.4th at p. 666.) On this record, it is not reasonably probable Garcia would have received a more favorable verdict absent counsel's alleged deficiencies.

4. *Remand Is Necessary To Afford Garcia the Opportunity To Request a Hearing Concerning His Ability To Pay Fines, Fees and Assessments*

a. *Garcia's argument has not been forfeited*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held a trial court cannot impose a court operations assessment as required by section 1465.8 or the court facilities assessment mandated by Government Code section 70373 without first determining the defendant's ability to pay. (*Dueñas*, at p. 1168.) We also held, although the trial court is required to impose a restitution fine under section 1202.4, subdivision (b), the court must stay execution of that fine until it determines the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)

In supplemental briefing Garcia contends under *Dueñas* the assessments and fees imposed by the trial court should be reversed and the execution of the restitution fine stayed unless and until the People prove he has the present ability to pay those sums. The People argue Garcia forfeited this issue on appeal because he failed to raise it in the trial court. However, as we recently explained when rejecting the same argument in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), at the time

the defendant was sentenced, "*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. Indeed . . . in the case of the restitution fine, section 1202.4, subdivision (c), expressly precludes consideration of the defendant's inability to pay. When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (*Castellano*, at p. 489; see also *O'Connor v. Ohio* (1966) 385 U.S. 92, 93 [87 S.Ct. 242, 17 L.Ed.2d 189]; *People v. Doherty* (1967) 67 Cal.2d 9, 13-14; see generally *People v. Brooks* (2017) 3 Cal.5th 1, 92 ["'[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence'"].) We similarly decline to apply the forfeiture doctrine to Garcia's constitutional challenge.

b. *A limited remand is appropriate*

Relying on *Dueñas,* Garcia asserts it is the People's burden to prove his ability to pay any fines, fees and assessments to be imposed. As we explained in *Castellano*, "*Dueñas* does not support that conclusion in the absence of evidence in the record of a defendant's inability to pay. . . . [¶] . . . [A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the

amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490; accord, *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168-1169.) If the trial court determines, after considering the relevant factors, a defendant is unable to pay, then the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant's ability to pay has been restored. (*Dueñas*, at pp. 1168-1169, 1172; *Castellano*, at p. 480.)

As Garcia's convictions and sentence are not yet final, we remand the matter to the trial court so that he may request a hearing and present evidence demonstrating his inability to pay the fines, fees and assessments imposed by the trial court.

DISPOSITION

The convictions are affirmed, and the matter is remanded to give Garcia the opportunity to request a hearing on his ability to pay the fines, fees and assessments imposed by the trial court. If he demonstrates the inability to pay, the trial court must strike the court facilities assessments (Gov. Code, § 70373) and the court operations assessments (§ 1465.8); and it must stay the execution of the restitution fine. If Garcia fails to demonstrate his inability to pay these amounts, the fines, fees and assessments imposed may be enforced.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.